

KCPAO EVIDENCE CHECKLIST FOR RETAIL CRIMES

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In order to prosecute retail crime cases, the King County Prosecuting Attorney's Office (KCPAO) must have:

1. Sufficient proof of the defendant's identity;
2. Sufficient proof of what the defendant stole, attempted to steal, or intended to steal;
3. Sufficient proof of the value of the items that the defendant stole, attempted to steal, or intended to steal; and
4. Actual copies of key pieces of evidence.

In addition, there is other information that is extremely helpful for the KCPAO to have. The checklists and comments below are intended to be a guide for law enforcement officers (LEOs) and loss prevention officers (LPO) regarding these topics and common issues with them. However, this document is not exhaustive and is intended to supplement other KCPAO trainings and materials on these topics. Nothing in this document supersedes or takes precedence over the KCPAO's ethical obligations or formal Filing And Disposition Standards (FADS).

PROOF OF IDENTIFICATION:

- In order to prosecute any crime, the KCPAO must be able to prove beyond a reasonable doubt—using only evidence admissible in court—that the defendant is the one who committed the crime.
- Common evidence useful in establishing the defendant's identity in the retail crimes context includes:
 - Surveillance footage of the incident;
 - Known photographs of the defendant;
 - Statements from an LPO or employee identifying the defendant via an appropriate LEO-conducted identification procedure (e.g. photomontage or showup); and/or
 - Statements from an LEO, LPO, or employee directly identifying the defendant.
 - Identification based on such a statement needs to be more than a bare assertion from the LEO, LPO, or employee that they know the individual to be the defendant. The statement needs to also document why and how the LPO/LEO/employee knows this.
 - Keep in mind that, under Washington law and the rules of evidence, a witness will generally not be allowed to testify at trial that they recognize the defendant in a photo or video unless there is also evidence explaining why the witness is better able to make that determination than the members of the jury.

- Information establishing the defendant's identity and how it is known should be included in written reports/statements and referenced in the certification for determination of probable cause.

PROOF OF WHAT WAS TAKEN:

- In order to prosecute a retail crime, the KCPAO must be able to prove beyond a reasonable doubt—using only evidence admissible in court—what the defendant took, attempted to take, or intended to take. This does not necessarily mean that every single item must be documented. However, it does generally require something more precise than “various items of merchandise.”
- Common evidence useful in establishing what was taken or what the defendant attempted or intended to take includes:
 - Surveillance footage of the incident;
 - Photographs or other documentation of items recovered (either abandoned or in a search incident to arrest or other lawful search of the defendant); and/or
 - A statement from an LPO or employee describing what items the defendant took or attempted to take.
 - Even if an LPO or employee cannot say exactly what was taken, an estimate—along with an explanation of what the estimate is based on—can be helpful.
 - Keep in mind that, under Washington law and the rules of evidence, a witness is generally not allowed to testify as to what someone else told them (i.e. hearsay), so—for example—an LPO who did not actually witness the events will not be allowed to testify as to what another employee told them was taken. As a result, such statements need to be provided by the person who actually witnessed what happened. If an LEO or LPO provides a summary of what someone else saw, they **MUST** document who the actual observer was and provide information as to how to contact that person in case they are needed as a witness.
- Information establishing both what the defendant took or attempted or intended to take and how that is known should be included in written reports/statements and referenced in the certification for determination of probable cause.

VALUE OF THE MERCHANDISE:

- In order to prosecute many retail crimes, the KCPAO must be able to prove beyond a reasonable doubt—using only evidence admissible in court—the value of what the defendant took, attempted to take, or intended to take.
- Common evidence useful in establishing value includes:
 - Itemized lists generated by the retailer that show the value of the items in question. Examples of such lists include or can be found in:
 - Receipts;

- Inventory logs;
- Internal retailer investigation reports.
- Photographs or other documentation of the price tags affixed to recovered items of merchandise; and/or
- A statement from an LPO or employee describing the items and their respective values.
 - Even if an LPO or employee cannot say exactly what was taken, an estimate can be helpful.
 - To be useful, an estimate must do more than simply make a conclusory statement. It would generally be insufficient, for example, to simply say “the defendant stole approximately \$2500 worth of merchandise.” Rather, the basis for the estimate must also be explained so that the likely accuracy of the estimate—and the weight the finder of fact will give it—can be assessed.
 - For example, even if the witness cannot say exactly what was taken, something like the following would probably be sufficient:
 - “I could not tell exactly how many pairs of jeans the person took. However, they took every pair of jeans on the display rack and that rack had recently been restocked with 10-15 pairs of jeans. Each pair of jeans on that rack retails for \$129.99, so I can estimate that the person stole around \$1300 - \$1950 worth of merchandise.”
 - Keep in mind that, under Washington law and the rules of evidence, a witness is generally not allowed to testify as to what someone else told them (i.e. hearsay), so—for example—an LPO who did not actually witness the events will not be allowed to testify as to value if that value was actually determined or estimated by another employee. As a result, such statements need to be provided by the person who actually determined or estimated value. If an LEO or LPO provides a summary of this information, they MUST document who the actually provided it and provide information as to how to contact that person in case they are needed as a witness.
 - Depending on the circumstances, it may be possible for different witnesses to provide information on: 1) what was taken; and 2) the value of what was taken.
- Not every retail crime necessarily requires proof of value (e.g. value is not an element of either Burglary in the Second Degree or Robbery in the Second Degree). However, it is still helpful for the KCPAO to have information regarding value even in these cases. For example, how the KCPAO charges or resolves a given retail crimes case under its FADS can be impacted by the value. Similarly, even when value is not an element of the offense, it can be highly relevant to a court imposing sentence following a conviction. As a result, efforts should generally be made to obtain documentation of value even when it is not an element of the crime.

- Information establishing both the value of what the defendant took, attempted to take, or intended to take and how that value was determined should be included in written reports/statements and referenced in the certification for determination of probable cause.

COPIES OF KEY PIECES OF EVIDENCE:

- If there is a key piece of evidence, the KCPAO must typically review it BEFORE charges can be filed. (This is due to both practical considerations and our ethical obligations as prosecutors.) The more crucial the piece of evidence to proving an element of the crime, the more important it is that we review it prior to filing. KCPAO DPAs often find themselves having to delay filing a case because a certain item or document—that we know exists and that LPOs or LEOs have—wasn't included in the materials initially sent to us.
- Frequent examples of this include:
 - Evidence of what was taken and/or the value of what was taken
 - Except in rare circumstances, the KCPAO must generally have this evidence in its possession before charges can be filed
 - Surveillance footage
 - Except in rare circumstances, the DPA must personally review the footage before making a filing decision
 - Trespass Notices
 - The defendants involved in retail crimes cases have often previously been trespassed from the location they are accused of stealing from. If a defendant was previously trespassed, each subsequent entry to commit a theft would constitute a second-degree burglary.
 - To prosecute a burglary based on this, the KCPAO will need evidence establishing that the defendant was actually previously trespassed. This evidence can and should include, when available:
 - A copy of the written trespass notice from the retailer that includes the date of the trespass, the length of the trespass, the locations the defendant is trespassed from, and information about the person being trespassed including name and date of birth; and/or
 - Body worn video of the defendant being trespassed by an officer.

OTHER HELPFUL INFORMATION:

- It can save a lot of time and effort (for everyone) if the KCPAO has the name and contact information for a point of contact at the store who a DPA can reach out to directly to ask follow-up questions and get outstanding materials.
 - This person does not necessarily have to have witnessed the crime. What is more important is that the person is someone who can obtain and provide surveillance videos

and documentation and who can help the DPA in getting in contact with the actual witnesses.

- For LPOs: Provide this information to law enforcement each time you make a report and/or include it with any documentation you provide.
- For LEOs: Ask for this information each time you respond to a retail crime and include the contact's name and information in your report.
- Information regarding previous contacts with the defendant at a given store or stores can be relevant and extremely helpful for KCPAO to know.
 - Such previous contacts:
 - Often may be aggregated with the current one in order to reach statutory minimums; and/or
 - Can be a basis for KCPAO to make an exception to our FADS in certain circumstances.
 - However, we need information beyond a mere reference. (For example, a cursory statement like "this is the fifth time the defendant stole from this store this week" would be insufficient for either of the above purposes.)
 - Wherever possible, provide the case/incident number and any store materials from prior instances referenced.